PENGARAH, LEMBAGA PELESENAN KENDERAAN PERDAGANGAN, SEMENANJUNG MALAYSIA & ORS v. SISTEM TRANSIT ALIRAN RAKYAT 7 SDN BHD

COURT OF APPEAL, PUTRAJAYA
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
ABDUL AZIZ ABDUL RAHIM JCA
[CIVIL APPEAL NO: W-01-811-2010]
30 JULY 2012

ADMINISTRATIVE LAW: *Exercise of administrative powers – Licence – Application for licence to operate mini bus services – Whether approval from Commercial Vehicles Licensing Board obtained – Whether "surat tawaran kelulusan lesen baru (STK)" issued to respondent implied that proper licence would be issued once all requirements were satisfied – Whether letter of approval from local authority obtained – Whether first appellant may request for information which is required before issuing licence – Whether first appellant had statutory duty to grant licence – Whether first appellant had reasonable basis to withdraw STK – Whether respondent suffered damages – Commercial Vehicles Licensing Board Act 1987, ss. 15 & 16*

The respondent ('plaintiff') applied for 24 licences to operate mini bus services around Malacca Historical City under the Commercial Vehicles Licensing Board Act 1987 ('the Act'). The applications were directed to the first appellant ('first defendant'), a public authority entrusted with the statutory power to, *inter alia*, approve licences for commercial vehicles and matters related thereto. The first defendant informed the plaintiff that the applications had been approved and 24 sets of 'surat tawaran kelulusan lesen baru' ('STK') were issued to the plaintiff with terms and conditions attached to it. *Vide* its letter dated 10 August 2004, the plaintiff informed the Mayor of the Historical Malacca City Council ('the Mayor') that the Commercial Vehicle Licensing Board, West Malaysia ('the Board') had approved its application and the plaintiff also expressed hope to get the full co-operation of Historical Malacca City Council ('the City Council') in providing the bus services. On 11 August 2004, the Board (Southern Region) informed the plaintiff to obtain prior consent and approval from the City Council to operate on the proposed bus routes. The Mayor, however, informed the plaintiff that the City Council did not agree with the bus routes proposed by the plaintiff as it would cause socio-economic problems to the operators of taxis, trishaws and existing bus services. As a result, the Board informed the plaintiff that it had decided to withdraw or retract and cancel the STK issued to the plaintiff. By way of writ of summons, the plaintiff filed a suit in the High Court against the defendants and submitted, *inter alia*, that the first defendant breached its statutory duty and claimed for pure economic loss and damages. Further, the plaintiff contended that the retraction of the

STK was unlawful, unjustified and not supported by the Act, *ultra vires* and against the principle of natural justice. The trial court allowed the plaintiff's claim and hence, this appeal. The issues that arose for consideration were (i) whether the first defendant had breached its statutory duty when it withdrew, retracted and subsequently cancelled the STK; (ii) whether the first defendant acted in excess of its authority; and (iii) whether the plaintiff was entitled to claim for pure economic loss and damages. Further, the defendants raised certain preliminary objections, *ie*, that (a) the plaintiff cited the wrong party as the first defendant and the proper party was the the Board; and (b) the plaintiff should challenge the first defendant's decision by way of judicial review.

Held (allowing appeal; setting aside decision of the High Court)
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) In relation to the preliminary objection that the wrong party had been cited, the notes of proceedings showed that on the first day of trial, the plaintiff's counsel made an oral application to delete the word 'Ketua' from the words 'Ketua Pengarah' and the defendant did not object to the said oral application. Naming the 'Pengarah LPKP' (Director of the Board) as the first defendant constituted sufficient compliance with ss. 5 and 6 of the Government Proceedings Act 1956. Further, the defendants had entered unconditional appearances to the action. As such, there was no merit in this preliminary objection. (para 14)

(2) In relation to the second preliminary objection, a challenge to the procedure is not a point of law but a matter of procedure and must be taken at the onset of the case in the High Court. In *Gan Chong Guan Transport Sdn Bhd v. Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors*, it was decided that failure to comply with O. 53 of the RHC 1980 was an irregularity, provided that a proceeding should not be wholly set aside on the ground that the proceedings was required by the Rules to be begun by an originating process other than the one employed. The remedies for protecting both private and public rights can be given in private law proceedings and an application for judicial review (*Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors*, refd; *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*; refd). (paras 16, 18 & 19)

(3) The STK was a 'surat tawaran kelulusan' and not a licence. It implied that the first defendant would issue the proper licence once all the requirements were met. The STK was not a licence to operate commercial vehicle and remained as a mere approval for the licence. The plaintiff wrote to the Mayor only after the first defendant had issued the STK informing the former that the first defendant had approved the plaintiff's applications and was seeking the co-operation

of the City Council to make the venture successful. This showed that the plaintiff had not consulted or obtained the approval from the City Council before submitting its applications to the first defendant. (paras 12 & 27)

(4) The first defendant may insist on the plaintiff to obtain the approval from the City Council before the actual licence was issued. The first defendant may do this pursuant to s. 15(2) of the Act. Under that section, the applicant, *ie*, the plaintiff may be required to give to the Board, *ie*, the first defendant '... information which is required ...' by the first defendant for the discharge of its function in relation to the application, in addition to any other information. One of the information or requirement under s. 15(2)(b) was a letter of approval from the relevant local authority regarding the usage of stops or terminal facilities in the area of administration of the local authority where the route was located. The first defendant may request for such information or requirement which was relevant and necessary to consider before issuing the licence under s. 16 of the Act. (para 27)

(5) Pursuant to s. 16(1)(e) of the Act, the first defendant had full discretion either to grant or refuse a licence. The learned judge had misconstrued the requirement for the approval from the City Council as an additional condition for the licence to be issued. The plaintiff was aware of the consequences of not obtaining the approval from the City Council. Further, the plaintiff did not file any protest or complaint with the first defendant or its southern branch representative office against the first defendant's letter dated 11 August 2004 which requested the plaintiff to obtain prior consent and approval from the City Council over the proposed routes. Since the consent and approval from the City Council was never applied for and was never obtained, the requirement under s. 15(2)(b) of the Act had not been complied with and therefore, the first defendant in its discretion had a reasonable basis to withdraw the STK issued to the plaintiff. (paras 27-29)

(6) When a statute gives a discretionary power to a public authority or public body and that power is to be exercised in absolute discretion, it could not be said that the public authority or public body must do the act which it is empowered by the statute as a matter of carrying out its duty. The language used in ss. 15 and 16 of the Act did not support the contention that the first defendant was under a statutory duty to grant the licences applied for under the Act, even though the first defendant had indicated by the issuance of the STK offering to approve the licences upon all requirements being met. (para 30)

(7) There was no express and unequivocal language used in ss. 15 and 16 of the Act to show that there was a statutory duty imposed on the first defendant in respect of granting the licence to the plaintiff. There was

A no statutory duty imposed on the first defendant by these two sections. As such, the argument that the first defendant had breached its statutory duty in retracting the STK had no merit. (para 32)

(8) This court was not dealing with a local authority but with a public authority in the form of a Board, *ie*, the first defendant which was armed with statutory powers to grant or refuse licences pertaining to commercial vehicles. This particular authority is the arm of the Government. Therefore, the pronouncement by the majority judgment in *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* that policy consideration and local circumstances should be taken into account to limit the recovery against the Government for pure economic loss applies. Similar to a local authority, the Government has a host of public duties and functions to perform. Though one may argue that the resources available at the disposal of the Government was much more than that which was available to a local authority, the resources were nevertheless limited and the application to those resources to meet the myriad of duties and functions to be carried out by the Government had to be prioritised. (para 37)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Amirthanayaki Kumarasamy v. Lembaga Kelayakan Profesion Undang-Undang, Malaysia [2010] 6 CLJ 593 CA ***(refd)***

Gan Chong Guan Transport Sdn Bhd v. Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors [2012] 2 CLJ 389 CA ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Perbadanan Nasional Bhd v. Syed Omar Syed Mohamed [2011] 1 LNS 96 HC ***(refd)***

Trustees of Dennis Rye Pension Fund & Anor v. Sheffield City Council [1997] 4 All ER 747 ***(refd)***

UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals [2009] 1 CLJ 329 FC ***(refd)***

Legislation referred to:

Commercial Vehicles Licensing Board Act 1987, ss. 15(2)(b), (3), 16(1)(e)
Government Proceedings Act 1956, ss. 5, 6
Rules of the High Court 1980, O. 2 r. 1(1), (3), O. 53
Street, Drainage and Building Act 1974, ss. 4(1), 12(1)

For the appellants - Azizah Nawawi; SFC
For the respondent - Liow Si Khoon; M/s Liow & Co

[For the High Court judgment, please see Sistem Transit Aliran Rakyat 7 Sdn Bhd v. Pengarah Lembaga Perlesenan Kenderaan Perdagangan, Semenanjung Malaysia & Ors [2012] 1 LNS 1057.]

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] This is the appellants' appeal against the decision of Lau Bee Lan J given on 7 April 2012 allowing the respondent's claim for loss of projected profit, interest and costs grounded *inter alia* on breach of statutory duty, legitimate expectation, estoppel and *ultra vires* act in respect of the withdrawal or retraction of the surat tawaran kelulusan (STK) for licence to operate mini bus services around Bandaraya Melaka Bersejarah (BMB).

[2] For convenience, in this appeal the appellants will be referred to collectively as the defendants (unless stated otherwise) and the respondent as the plaintiff, as the parties were before the High Court.

Background And Facts Of The Case

[3] The plaintiff was the applicant for 24 licences to operate mini bus service in BMB under Commercial Vehicles Licensing Board Act 1987 (Act 334) – ("the Act"). The applications for the licences were directed to the first defendant who is the public authority entrusted with the statutory power *inter alia* to approve licences for commercial vehicles and matters related thereto; and this an agreed fact by the parties.

[4] The first defendant then wrote to several authorities – Datuk Bandar Majlis Bandaraya Melaka Bersejarah, Ketua Pengarah Jabatan Pengangkutan Negeri Melaka, Ketua Polis Melaka and Persatuan Pengusaha Bas Melaka – to get feedback on the applications.

[5] On 17 June 2004 the first defendant informed the plaintiff by letter that the applications had been approved and 24 sets of surat tawaran kelulusan lesen baru (STK) were attached to the said letter.

[6] The STK contains certain conditions which are not really relevant for our purpose. It is however pertinent to note that para. 4 of the STK makes it very clear that "4. Surat Tawaran Kelulusan ini bukan Lesen Kenderaan Perdagangan.". In plain English, the STK is not a commercial vehicle licence.

[7] On 10 August 2004 the plaintiff informed Datuk Bandar Majlis Bandaraya Melaka Bersejarah by letter of the same date (exh. P13) that Lembaga Pelesenan Kenderaan Perdagangan Semenanjung Malaysia (LPKP) had approved its application to provide mini bus services along six routes which was attached to the letter as "Lampiran A". In the same letter, the plaintiff also expressed hope to get the full co-operation of Majlis Bandaraya Melaka Bersejarah (MBMB) in providing the bus services and also informed the Datuk Bandar that in the first phase of the plaintiff's operation,

A the plaintiff would provide 12 air-conditioned buses along the specified routes and that the plaintiff expected to commence services in September 2004. A copy of the letter was sent to LPKP (Wilayah Selatan).

[8] On 11 August 2004, LPKP (Wilayah Selatan) wrote a letter to the plaintiff (with a copy to the Datuk Bandar Melaka Bersejarah referring to its STK dated 17 June 2004 and the proposed bus routes in Lampiran A to the plaintiff's letter of 10 August 2004 to Datuk Bandar MBM) advising the plaintiff to get prior consent and approval from the MBMB to operate on the proposed bus routes. The second paragraph of the LPKP letter reads:

> Sukacita dinasihatkan supaya tuan mendapatkan persetujuan dan kelulusan daripada Majlis Bandaraya Melaka bersejarah (MBMB) terlebih dahulu ke atas laluan-laluan Bas Mini yang telah dipersetujui oleh PLKP seperti yang tercatat di Lampiran A. Jabatan ini hanya akan memproses untuk mengeluarkan lesen-lesen Bas Mini setelah surat rasmi daripada MBMB diperolehi. Surat kelulusan MBMB tersebut perlulah dilampirkan pada Surat Tawaran Kelulusan semasa tuan memasukkannya ke LPKP bagi tujuan mendapatkan lesen asal Bas Mini.

[9] In September 2004, Datuk Bandar Majlis Bandaraya Melaka Bersejarah wrote two letters to the plaintiff. One is undated (exh. P30) and the other was dated 7 September 2004 (exh. P31). In exh. P30, Datuk Bandar informed the plaintiff that there was no requirement for mini bus service within the Bandaraya and therefore the plaintiff was not allowed to operate the bus service. In exh. P31, the plaintiff was informed that the MBMB did not agree with bus routes proposed by the plaintiff and approved by LPKP. The reason given was that the service was at the time inappropriate and would cause socio-economic problems to the operators of taxis, trishaws and existing bus services. It is observed that on exh. P31 there were some scribbled handwritten notes. From these notes it appear that the letter exh. P31 was originally sent to LPKP and then later a copy of it was sent to the plaintiff by sticking on plaintiff's address onto the letter.

[10] Upon receipt of these two letters, the plaintiff wrote an appeal letter dated 25 September 2004 to the Ketua Menteri of Melaka to reconsider the position taken by Datuk Bandar Majlis Bandaraya Melaka Bersejarah refusing to allow plaintiff to operate the mini bus services within the Bandaraya.

[11] Apparently, the plaintiff's appeal to the Ketua Menteri was not successful. This is because on 23 June 2005, LPKP wrote to the plaintiff informing the plaintiff that LPKP at its board meeting No. 05/2005 held on 8 March 2005 had decided to withdraw or retract and cancel the STK issued earlier to the plaintiff *vide* its letter of 17 June 2004.

[12] The above facts are not in dispute. It is also not in dispute that condition No. 4 printed on the reverse of the STK clearly provides that: "Perkhidmatan tidak boleh dijalankan oleh tuan selagi lesen yang sah belum

dikeluarkan oleh LPKP". This fact is of great relevance because the plaintiff knew from the STK itself that the STK is not a licence to operate a commercial vehicle. The STK remains as a mere approval for the licence but not the licence itself. The licence had not been issued and yet to be issued on the date the LPKP retracted the STK.

The Issues

[13] Given the above factual matrix of the case, the issues in this appeal are the same issues that were canvassed before the High Court. There are two primary issues. Firstly, whether the first defendant had breached its statutory duty when it withdrew and retracted and subsequently cancel the STK; and in doing so, for the reasons found by the learned High Court Judge, whether the first defendant had acted in excess of its authority or in *ultra vires*. Secondly, if there is a breach of statutory duty by the first defendant and that the first defendant had acted in excess of its authority, is the plaintiff entitle to claim for pure economic loss and damages? In addition to the primary issues, there are preliminary issues raised by the defendants in this appeal. We will deal with these preliminary issues immediately below.

The Preliminary Issues

[14] The first preliminary issue raised by the defendants in this appeal is that the plaintiff had cited the wrong party to be the first defendant. It was submitted that there was no such legal entity known as "Pengarah, Lembaga Pelesenan Kenderaan Perdagangan", the first defendant under the Act. It was submitted that proper party is Lembaga Pelesenan Kenderaan Perdagangan (LPKP). It was submitted that naming the "Pengarah, Lembaga Pelesenan Kenderaan Perdagangan" as the first defendant is insufficient. It was argued that under the Act it is the LPKP or the Board that is empowered to grant or refuse a licence under the Act. The defendants responded to this issue by arguing that this is a new issue raised for the first time before us and was never raised at the High Court. It is interesting to note however that at the commencement of this action, the first defendant was described as the "Ketua Pengarah Lembaga Pelesenan Kenderaan Perdagangan". The notes of proceedings show that on the first day of trial, learned counsel for the plaintiff had made an oral application to delete the word "Ketua" from the words "Ketua Pengarah"; and there was no objection by the defendants as to oral application. The oral application was allowed. The learned judge found no merit in this issue and we think she is right. The learned judge had considered the submissions by the learned Senior Federal Counsel that the post "Ketua Pengarah LPKP" does not exist under any provisions of the law. The learned judge had dismissed this objection. She was of the view that the facts and circumstances of the case are peculiar and that the exh. P28 and the letter dated 23 June 2005 (the retraction letter) was signed by DW4 not in his personal capacity but for and on behalf of LPKP, and

therefore naming the Pengarah LPKP as the first defendant constituted sufficient compliance with ss. 5 and 6 of the Government Proceedings Act 1956. On this issue we note that in the court below all three defendants had entered unconditional appearances to the action. This, coupled with the fact that the defendants did not object to the oral application by the plaintiff to amend the name of the first defendant in the court below renders this issue at this appeal as moot. Furthermore, in his written submission before us, learned counsel for the respondent submitted that the legal advisor to LPKP had informed the High Court that the first defendant has been suing and being sued in the name of "Pengarah LPKP". In view of this evidence and concession, we find no merit in this preliminary objection.

[15] The next preliminary objection by the defendants is that the plaintiff should challenge the first defendant's decision by way of judicial review and not by way of writ of summons as in this case. Apparently this issue was raised by the defendants before the learned trial judge at the end of the trial and the learned judge ruled that the defendants were estopped from doing so – the point raised not being a point of law. Thus the learned judged dismissed this objection; and also the learned judge ruled that this case falls within the exception to the general rule where O. 53 RHC 1980 applies.

[16] Citing the Federal Court decision in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 it was submitted for the defendants that any challenge to the exercise of a statutory power or discretion by a public authority (and it is not disputed that LPKP is a statutory authority) or a public officer must be made by way of judicial review under O. 53 as this is the explicit procedure provided for such purpose. It was further submitted that in cases where there are overlapping issues of public law and private law the court must determine which issue is more dominant. If the public law issue is more dominant then the action must proceed by way of judicial review; otherwise the action may commence by way of writ or originating summons, as the case may be. In this regard, it was submitted that based on high authority, since the use of appropriate procedure is very much fact based it is necessary for the trial judge to ascertain whether there is a public law element in the dispute. In this appeal, it was submitted that the plaintiff pleaded case is a mixture of public law and private law. The public law element is grounded on the issue of legitimate expectation based on the approval letter dated 17 June 2004 and the issue of estoppel in that the defendants are estopped from revoking the approval letter. The private law element is grounded on negligence in that the first defendant is negligent in carrying out his statutory duties under the Act. However, the plaintiff submitted and emphasised that its primary complaint is the revocation of the licences by the first defendant which involves an exercise of power under the Act. Therefore it was argued that the plaintiff's case is predominantly a complaint in public law and the private law complaint is only secondary. It is the contention of the

defendants that the plaintiff's pleaded case does not fall within the exception to the general rule as the private law issue of negligence is only collateral issue. It was submitted that it is clearly an abuse of process of the court for the plaintiff to file a writ action.

[17] Before us, learned counsel for the plaintiff submitted that the complaint by the defendants with regard to the applicability of O. 53 relates to and essentially concerned with the mode of commencement. It was submitted, on the authority of *Amirthanayaki Kumarasamy v. Lembaga Kelayakan Profesion Undang-Undang, Malaysia* [2010] 6 CLJ 593, which was applied in *Perbadanan Nasional Berhad v. Syed Omar Syed Mohamed* [2011] 1 LNS 96, that procedural technical objections as to commencement of action should not be allowed to obstruct the process of justice to the deserving.

[18] The learned judge agreed with the submission by the plaintiff on this point and so do we. A challenge to the procedure is not a point of law but a matter of procedure; and therefore must be taken at the onset of the case in the High Court. This position was approved by the Federal Court in *Ahmad Jefri* (*supra*). The Court of Appeal adopted and applied the position in *Gan Chong Guan Transport Sdn Bhd v. Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia & Ors* [2012] 2 CLJ 389 when it said that to allow the issue to be raised at the close of the entire case is to deny the other party all opportunity to remedy the mode of proceedings. Moreover, the Court of Appeal added, that whatever failure to comply with O. 53 is an irregularity (see O. 2 r. 1(1) and O. 2 r. 1(3)) provided that a proceeding should not be wholly set aside on the ground that the proceeding was required by the Rules to be begun by an originating process other than the one employed. In rejecting this procedural and technical objection the learned judge had also considered the fact that the defendants had not objected to the mode of commencement when filing their unconditional appearance and had not raised the same in the statement of agreed issues to be tried.

[19] It is pertinent to note that the Federal Court speaking through the judgment of the learned Steve Shim CJSS, and discussing the dichotomy between public law and private and the mode of commencement in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1, was of the view that remedies for protecting both private and public rights can be given in a private law proceedings and an application for judicial review. The view was expressed after the court had considered a number of English cases and in particular the English Court of Appeal case of *Trustees of Dennis Rye Pension Fund & Anor v. Sheffield City Council* [1997] 4 All ER 749.

[20] Having dealt with the preliminary issues raised by the defendants, and on which issues we find no merits, we will now consider the substantive issues in this appeal.

[21] The first substantive issue is whether the first defendant ie, LPKP had breached its statutory duty under the Act when it withdrew the STK.

[22] Before the High Court below, the parties have agreed to certain facts as found in the statement of agreed facts. The agreed facts are as follows (in the original Bahasa Malaysia):

(a) Defendan pertama (merupakan agensi kerajaan) memegang kewajipan statutory dalam *inter alia* melaksanakan tugas bagi tujuan pelesenan dan penyelarasan kenderaan perdagangan dan hal-hal lain yang berkaitan dengannya sekiranya syarat-syarat dipenuhi;

(b) Pada atau lebih kurang 6.2.2004, plaintif telah dengan rasminya mengemukakan sebanyak 24 permohonan lesen masing-masing kepada defendan pertama untuk tujuan menjalankan perkhidmatan bas mini di Bandaraya Melaka Bersejarah;

(c) Defendan pertama pernah menulis kepada 4 pihak selaras dengan surat bertarikh 27.5.2003 untuk mendapatkan maklum balas berkenaan dengan permohonan plaintif tersebut. Surat bertarikh 27.5.2003 telah ditujukan kepada Datuk Bandar Majlis Bandaraya Melaka Bersejarah, Ketua Pengarah Jabatan Pengangkutan Negeri Melaka, Ketua Polis Melaka dan Persatuan Pengusaha Bas Melaka;

(d) Melalui surat defendan pertama bertarikh 17.6.2004, defendan pertama telah memaklumkan kepada plaintif berkenaan dengan kelulusan penuh permohonan plaintif untuk mendapatkan lesen kenderaan perdagangan lesen bas mini tersebut berdasarkan mesyuarat lembaga yang telah diadakan pada 14.5.2004;

(e) Sebanyak 24 Surat Tawaran Kelulusan Lesen Kenderaan Perdagangan daripada defendan pertama telah dikeluarkan kepada plaintif dengan syarat-syarat dan terma-terma yang perlu dipatuhi;

(f) Plaintif ada menerima surat daripada Majlis Bandaraya Melaka Bersejarah (MBMB) pada 07.09.2004 yang menyatakan tidak memerlukan sebarang perkhidmatan tambahan kerana boleh menimbulkan komplikasi dengan perkhidmatan syarikat-syarikat bas yang sedia ada;

(g) Defendan pertama kemudiannya telah memaklumkan plaintif melalui surat rasmi mereka yang bertarikh 23.6.2005 bahawa mereka telah membuat 'keputusan' untuk 'menarik balik' dan 'membatalkan' Surat Tawaran Kelulusan Lesen Kenderaan Perdagangan untuk bas mini sebanyak 24 set yang masing-masing bertarikh 17.6.2004 dan meminta plaintif untuk memulangkan kesemua 24 set Surat Tawaran tersebut.

[23] In the High Court below, the parties also have agreed on the issues to be determined in the statement of issues to be tried as follows (in its original Bahasa Malaysia):

(a) Sama ada defendan pertama dengan mengenakan syarat-syarat tambahan/baru selepas permohonan lesen telah diluluskan kepada plaintif adalah bertindak mengikut klausa yang diberikan menurut Akta Lembaga Pelesenan Kenderaan Perdagangan (1987);

(b) Sama ada defendan pertama berkuasa untuk membatalkan/menarik balik lesen selepas kelulusan lesen tersebut telah diberikan secara sepenuhnya kepada plaintif;

(c) Sama ada tindakan unilateral defendan pertama yang membatalkan kelulusan dan menarik balik kesemua Surat Tawaran tersebut merupakan satu pemecahan kewajipan statutorinya dan/atau tindakan *ultra vires* dalam *inter alia* melaksanakan tugas bagi tujuan pelesenan atau penyelarasan kenderaan perdagangan dan hal-hal lain yang berkaitan dengannya;

(d) Jika ya, sama ada defendan pertama bertanggungan kepada kerugian-kerugian yang dialami oleh plaintif akibat pemecahan kewajipan statutori tersebut dan/atau tindakan *ultra vires* tersebut;

(e) Jika ya, sama ada defendan kedua dan/atau defendan ketiga juga bertanggungan secara vikarius kepada tindakan defendan pertama (iaitu pemecahan kewajipan statutori tersebut dan/atau tindakan *ultra vires* tersebut) yang mengakibatkan kerugian-kerugian kepada plaintif.

[24] The main thrust of the plaintiff's case is that the retraction of the 'surat tawaran kelulusan' – the STK – (exh. P10) was unlawful, unjustified and not supported by the Commercial Vehicles Licensing Board Act 1987 (Act 334)("CVLB Act"), *ultra vires*, negligent and against the principle of natural justice whilst the defendants' contention is that the retraction was made in accordance to the CVLB Act. On this issue, the learned High Court Judge found for the plaintiff and said, in para. 17 of his judgment, as follows:

> I find based on s. 115 of the Evidence Act 1950, the LPKP has by their declaration, act or omission intentionally caused or permitted D1 (sic) to believe that the STK was in full and without conditions and to act on the belief in purchasing buses and getting them ready for operation, otherwise than but that belief D1 (sic) would have acted, LPKP is estopped from denying the truth of that thing. To conclude for the reasons stated above I find D1 had no legal basis to retract the STK.

[25] In arriving at the above conclusion, the learned High Court Judge had considered ss. 15 and 16 of the Act that govern the application and granting of licence under the Act. The two sections provide:

A

15. (1) An application for a licence under this Part shall be made to the Board on the prescribed form in the prescribed manner.

(2) In addition to any other information which may be required to be given under this Act, the applicant shall give to the Board the following information which is required for the discharge of its
B functions in relation to the application:

(a) complete information on the details of the route which is related to the application;

(b) a letter of approval from the relevant local authority regarding the usage of stops or terminal facilities in the area of
C administration of the local authority where the route is located;

(c) a justification report for the route; and

(d) any other information as may be determined by the Board.

D

(3) The Board may refuse to register, proceed with or hear or determine an application, and may require that the application be appropriately amended or completed and resubmitted or that a fresh application be submitted in its place if:

(a) the application form as prescribed is not duly completed by
E reason of any omission or misdescription;

(b) the application form contains any error or alteration; or

(c) the application does not comply with any other prescribed requirement.

F

And

16. (1) Subject to this Act, the Board on an application for a licence under this Act shall have full power in its discretion:

G (a) to grant the application in full or in part;

(b) to grant a licence in respect of motor vehicles other than those involved in the application;

(c) to grant a licence of a different class or for a different maximum permissible laden weight, passenger capacity or type
H of goods to be carried from that specified in the application;

(d) to grant a licence in which the area or time of operation is different from that specified in the application; or

(e) to refuse the application.

I

(2) A person may be the holder of two or more licences, whether of the same class or of different classes.

[26] In interpreting these two sections, the learned High Court Judge agreed with the plaintiff's submission that s. 15 deals with pre-approval stage and s. 16 deals with the approval and refusal stage. The learned judge found that the first defendant did not refuse to register the 24 applications upon receiving them from the plaintiff; instead the first defendant proceeded to hear and determine the applications and approved them in full. In our view, this is permissible under s. 15(3) of the Act. On the evidence of DW4, the learned judge found that in approving the plaintiff's application then, the approval from MBMB was not an issue and that there was no objection raised against any of the applications. The learned judge also held that s. 16 of the Act does not specifically mention that the approval of the STK shall be granted "with or without conditions". The learned judge noted that the retraction of the STK's approval "was primarily because of MBMB's disapproval" of the proposed bus routes or services. Hence the learned judge rejected the defendants argument the first defendant could revoke or retract the STK under s. 15(2)(b) of the Act because the plaintiff had failed to obtain the approval from MBMB to operate the bus services along the proposed approved routes. Her Ladyship reasoning for this is found in para. 16(f) of her written judgment and it reads:

> 16(f). DW2 in cross-examination said that he relied on s. 15(2)(b) of the CVLB Act to revoke the STK. However this is not possible as s. 15(2)(b) is a pre-approval requirement and is a pre-section 16 requirement, i.e. s. 15 would be superceded by s. 16 and it is unacceptable for Defendan pertama to "U-turn" and "re-consider" the activities envisaged in s. 15 after D1 had approved in full the plaintiff's application as to do so would be negligence and acting *ultra vires* the CVLB Act.

[27] In our view, the learned judge had overlooked the fact that the STK is not a licence. This fact is clearly stated in para. 4 of the STK. This is a pertinent fact. The STK is what it meant that is it is just "surat tawaran kelulusan". It is not a licence. It implies that the first defendant would issue the proper licence once all requirements are met. From the chronology of events, we observe that the plaintiff wrote to the Datuk Bandar MBMB only after the first defendant had issued the STK informing the former that the first defendant had approved the plaintiff's applications and seeking the co-operation of the MBMB to make the venture successful. This shows that the plaintiff had not consulted or obtained approval of the MBMB before submitting its applications to the first defendant. Almost immediately after the plaintiff's letter to the Datuk Bandar, the first defendant representative for the South Region wrote to the plaintiff a letter and copied to MBMB advising the plaintiff to obtain approval from MBMB to operate the bus services on the proposed routes approved by the first defendant. In our view, the first defendant may insist on the plaintiff to comply with this requirement before the actual licence is issued. We think the first defendant may do this pursuant to s. 15(2) of the Act. Under that section, the applicant (who was the plaintiff in this case) may be required to give to the Board

(LPKP) ie, the first defendant "... information which is required ..." by the first defendant for the discharge of its function in relation to the application, in addition to any other information. And one of the information or requirement under sub-s. 15(2)(b) is a letter of approval from the relevant local authority regarding the usage of stops or terminal facilities in the area of administration of the local authority where the route is located. In our view, the first defendant may request for such information or requirement which is relevant and necessary to consider before issuing the licence under s. 16 of the Act. In this regard we note that under s. 16 of the Act, in particular sub-s. (1)(e), the first defendant has full discretion either to grant or refuse a licence. Therefore we could not agree with the conclusion and finding by the learned High Court Judge as stated in para. 17 of Her Ladyship judgment quoted above.

[28] In para. 16(e) of Her Ladyship's judgment, the learned judge seems to treat requirement to obtain the approval from MBMB as an additional and add on condition which is not provided for in s. 16 of the Act and merely advisory in nature. We also could not agree with this. In our view, the learned judge had misconstrued the requirement for the approval from MBMB as an additional condition of the licence to be issued under that section. The learned Senior Federal Counsel Puan Azizah Nawawi submitted that the requirement for the approval from MBMB as the local authority in charge of the administration of the local authority where the approved routes are located was requested under s. 15(2) of the Act. It is a requirement which the first defendant would need to consider before approving the licence. In this regard, the learned Senior Federal Counsel draws our attention to condition 1(iv) at the reverse of the STK issued to the plaintiff which reads:

> *Tuan bersedia mematuhi apa-apa syarat yang ditentukan oleh Lembaga dari masa ke semasa. Sebarang pengingkaran terhadap syarat-syarat tersebut, tawaran ini akan terbatal dengan sendirinya*. (emphasis added)

[29] It would appear that the plaintiff was fully aware of the consequence of not obtaining the approval from MBMB. We also observe that the plaintiff did not file any protest or complaint with the first defendant or its southern branch representative office against the first defendant's letter of 11 August 2004 (exh. P20) requesting the plaintiff to obtain prior consent and approval from MBMB over the proposed routes approved by the first defendant. There is also no evidence to show that the plaintiff had written to MBMB for such consent or approval as advised. Since the consent and approval from MBMB was never applied for and was never obtained, we agree with the submission by the learned Senior Federal Counsel the requirement under s. 15(2)(b) of the Act has not been complied with and therefore the first defendant in its discretion had a reasonable basis to withdraw the STK issued to the plaintiff.

[30] However, the primary question to answer is whether ss. 15 and 16 of the Act imposed a duty on the first defendant to do any act as a public authority or body. If so, what is that duty? The learned Senior Federal Counsel submitted that the section did not impose any statutory duties on the first defendant, and therefore, there cannot be any breach of duty if there is no duty imposed by the statute. We agree with the submission. Section 15 of the Act provides for an application for a licence to be made to the first defendant. Under s. 15(3) of the Act, the discretion is with the first defendant either to refuse to register or to proceed with the hearing of the application or to take such other action provided for under that subsection in respect of an application made to it. Section 16 of the Act is the empowering section. It empowers the first defendant to grant or not to grant a licence in its absolute discretion. Sub-section (1) to s. 16 of the Act provides that the first defendant "shall have full power in its discretion" to grant or to refuse an application for a licence under the Act. In our view, when a statute gives a discretionary power to a public authority or public body and that power is to be exercised in absolute discretion of the public authority or public body, it cannot be said that the public authority or public body must do the act which it is empowered by the statute as a matter of carrying out its duty. A distinction must be drawn between a duty to do an act and the power to be exercised in respect of doing an act. Reading the two sections ie, s. 15 and s. 16 of the Act, we are of the view that the language used in the two sections does not support the plaintiff's contention and argument that the first defendant was under a statutory duty to grant the plaintiff the licences applied for under the Act, even though the first defendant has indicated by the issuance of the STK offering to approve the licences upon all requirements being met.

[31] As a comparison, we refer to the case of *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Bhd & Other Appeals* [2009] 1 CLJ 329; [2009] 1 MLJ 737, where the Federal Court had to deal with, among others, the question of whether Dato' Bandaraya Kuala Lumpur (DBKL), UDA and the Government had breached their respective statutory duties and thereby had caused a nuisance by the closing of a public street. In that case, and in relation to the issue of statutory duties, the court had discussed ss. 12 and 4 of the Street, Drainage and Building Act 1974 (Act 133). In brief, s. 12(1) of Act 133 provides that the local authority to maintain a public street which had been upgraded from a private street. Section 4(1) of the said Act however provides as follows:

> 4 (1) The local authority shall, so far as the funds at its disposal will admit, cause all public streets together with the footways thereof, whether covered by arcades or not, to be maintained and repaired and may:
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> (a) cause the same to be paved, metalled, flagged, channelled, drained, kerbed, lighted or otherwise improved, and the surface thereof to be raised, lowered or altered as it thinks fit;

A (b) make and keep in repair any footways for the use of foot passengers in any such street;

(c) place on the sides of such footways or otherwise such fences and posts as are needed for the protection of foot passengers;

B (d) provide street lighting.

[32] Abdul Aziz Mohamed FCJ in discussing the two provisions had said that s. 12 of Act 133 does not imposed a statutory duty on DBKL as the local authority to maintain the public street. That provision, he said is only intended to emphasise the consequence, as regard maintenance, of the C upgrading of such street so that there could be no question whatever that the maintenance of the street will always be the responsibility of the local authority. The learned judge however said that the local authorities' statutory duty to maintain public streets including, the upgraded private streets to public streets, is found in s. 4 of Act 133. The point we want to D emphasise here is that in order to determine whether a statutory provision imposes a statutory duty on a public authority or a public body, or simply empowering the public body or authority to do an act, one must look carefully at the language used in the relevant provisions of the statute. For the court to conclude that such a provision imposes statutory duty on a E public authority or public body to do any particular act, the language used must be clear and unequivocal. In this regard, and with reference to s. 4(1) of Act 133, it is to be noted that the language used is very clear, that is the local authority "shall, ... cause all public streets together with the footways thereof, ... be maintained and repaired ...". We observe there is no such F express and unequivocal language used in ss. 15 and 16 of the Act to support the conclusion arrive at by the learned judge that there was a statutory duty imposed on the first defendant in respect of the granting of licence to the plaintiff. Therefore, we conclude that there is no statutory duty imposed on the first defendant by these two sections. Consequentially therefore the contention that the first defendant had breached its statutory G duty in retracting the STK is of no merit.

[33] Having come to that conclusion, we are of the view that this appeal ought to be dismissed on this point alone and we need not consider the argument as to the claim for economic loss. However, for the sake of H completeness we will state our view as to this second issue in this appeal.

[34] In *UDA Holdings Bhd* (*supra*) the court also had to grapple with the issue of pure economic loss – whether a plaintiff could recover pure economic loss against local authority or the Government. As to the state of law on this issue in Malaysia, we will just refer to the passage found in the I judgment of the learned Zulkefli FCJ in *UDA Holdings Bhd* which reads as follows:

[141] The question that may be first asked in what is the meaning of 'pure economic loss'. To put it simply pure economic loss is financial or pecuniary loss that does not arise from any physical damage to the person or property (see the case of *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53). The legal position in Malaysia in relation to awards for claim for pure economic loss has been succinctly dealt with in the *Highland Towers* case (reference *Majlis Perbandaran Ampang Jaya v. Stephen Phoa & Ors* [2006] 2 MLJ 389 FC). His Lordship Abdul Hamid Mohamed FCJ (as he then was) in coming to his decision that the local authority, MPAJ was not liable on grounds of public policy and local circumstances in that case also dealt with the general position of the law in Malaysia with regard to claims for pure economic loss. His Lordship was of the view that Malaysian courts do not readily award claim for pure economic loss and the courts recognise the need to limit recoverability for pure economic loss. In his judgment His Lordship also referred to several local cases such as the cases of (1) *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor*; (2) *Kerajaan Malaysia v. Cheah Foong Chew & Ors* [1993] 2 MLJ 439 and (3) *Nepline Sdn Bhd v .Jones Lang Wootton* [1995] 1 AMR 451. It is clear from all these cited cases, the position in Malaysia is that our courts have been inclined to disallow claims for pure economic loss. If at all the court in allowing the claim as in *Nepline*'s case, did so on the ground that the claim was in respect of a definite amount which had already been paid by the appellant and it was that amount only which the appellant then sought to recover. [reference in bracket inserted by us]

[35] Zulkefli FCJ in *UDA Holdings Bhd* (*supra*) pointed out that in the case of *Highland Towers,* the court did not deal with the issue of breach of statutory duties. However, he said the principle alluded to in the *Highland Towers* case with regard to non recovery for economic loss against local authority grounded on public policy consideration and the local circumstances is applicable across the Board to cover all torts. In the word of the learned judge in *UDA Holdings Bhd* (*supra*):

[149] It is my considered view that the above reasoning of the Federal Court in the *Highland Towers* case would apply across the board to cover all torts. It should be seen that the considerations of 'local circumstances' and whether a local authority should be burdened with a huge financial liability on account of a single resident suing has nothing to do with the type of tort action on which the resident found his claim. In point of principle, these policy considerations have nothing to do with 'negligence' or 'nuisance' but everything to do with a pure economic loss award in tort against a local council, which becomes a financial burden on it. In other words, if it is a pure economic loss in tort, the

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> reasoning of the Federal Court in the *Highland Towers* case is that it should be barred under s. 3 of the CLA as non-recoverable for policy reasons. Otherwise, one is left with the anomaly of whether a huge economic loss claim in negligence is barred but an equally large economic loss claim under a 'non-negligence' head is admissible against a local authority. That in my view would surely defeat the policy considerations stated by the Federal Court in the said *Highland Towers* case.

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[36] Zulkefli FCJ judgment on the non-recovery of pure economic loss in *UDA Holdings Bhd* (*supra*) above is one of the majority judgment. The other judgment being the judgment by the learned Zaki Azmi CJ. The minority judgment was by Abdul Aziz Mohamed FCJ on this issue and it did not preclude a claim for economic loss against local authority.

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[37] In the present appeal, we are not dealing with a local authority; instead we are dealing with a public authority in the form of a Board (ie, first defendant) which is armed with statutory powers to grant or refuse licences pertaining to commercial vehicles. This particular authority is the arm of the Government. Therefore, the pronouncement by the majority judgment in *UDA Holdings Bhd* (*supra*) that policy consideration and local circumstances should be taken into account to limit the recovery against the Government for pure economic loss applies. Like a local authority, the Government have host of public duties and functions to perform, in fact even more so. Though one may argue that the resources available at the disposal of the Government is much more than that is available to a local authority, the resources are nevertheless limited and the application of those resources to meet the myriad of duties and functions to be carried out by the Government has to be prioritised.

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[38] For the above reasons, we are unanimous that this appeal should be allowed with costs of RM10,000 to the appellant; and we set aside the High Court order.

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